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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-630

PAUL HALL, individually and as President or AL KERR, as Secretary Treasurer, or EARL SHEPARD, as Vice President, or CAL TANNER, as Executive Vice President of the Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District,

Petitioners,

—v.—

JOHN COLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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INDEX

PAGE

Interest of Amicus 1

Statement of the Case 2

Summary of Argument 3

ARGUMENT:

I. A Union member whose suit under Title I protects the democratic processes of the Union and secures basic rights for other members of the Union may be awarded counsel fees 6

A. General Principles Guiding Award of Counsel Fees 6

B. The Statutory Policy Enforced by Private Suits Under Title I 11

C. The Benefit Conferred on the Union and on Other Members of the Union 16

D. The Need for Award of Counsel Fees 20

E. The Irrelevance of "Good Faith" Where the Suit Enforces Congressional Policy and Benefits the Union and Its Members .. 22

F. The Limited Burden on the Union 26

II. Congress did not preclude courts of equity from awarding counsel fees in Title I suits 27

A. The Words of Title I 28

PAGE

B. The Negative Inference Drawn From Other Sections 29

C. Legislative History of Section 102 32

CONCLUSION 38

TABLE OF AUTHORITIES

Cases:

Bell v. School Board of Towhatan County, 321 F.2d 494 (4th Cir. 1963) 7

Bradley v. School Board of City of Richmond, Virginia, 345 F.2d 310 (4th Cir. 1965) 22, 26

Brewer v. School Board of The City of Norfolk, Virginia, 456 F.2d 943 (4th Cir. 1972) 23

Burch v. International Association of Machinists, 454 F.2d 1170 (5th Cir. 1971) 18

Calhoon v. Harvey, 379 U.S. 134 (1964) 31

Detroy v. American Guild of Variety Artists, 286 F.2d 75 (2d Cir. 1961) 27

Farowitz v. Associated Musicians, 330 F.2d 999 (2d Cir. 1964) 24-25

Fleischman Corp. v. Maier Brewing Company, 386 U.S. 714 (1967) 30

Giordani v. Upholsterers International Union, 403 F.2d 85 (2d Cir. 1968) 25

Grand Lodge of Machinists v. King, 335 F.2d 340 (9th Cir. 1964) 31

PAGE

Johnson v. Nelson, 325 F.2d 646 (8th Cir. 1963) 19, 27

Kerr v. Screen Extras Guild, Inc., 466 F.2d 1267 (9th Cir. 1972) 17
Knight v. Auciello, 453 F.2d 852 (1st Cir. 1972) 10, 18

Lee v. Southern Home Sites Corp., 444 F.2d 143 (5th Cir. 1971) 9, 18, 23

Mills v. Electric Auto-Lite Company, 396 U.S. 375 (1970) 6, 7, 8, 10, 16, 19, 23, 27, 29, 30
Musicians Federation v. Wittstein, 379 U.S. 171 (1964) 16

NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala. 1972) 10, 18, 23
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 8, 9, 10, 15, 23

Radio Officers v. Labor Board, 347 U.S. 17 (1954) 20
Ratner v. Bakery & Confectionery Workers International Union, 335 F.2d 691 (C.A. D.C. 1964) 17
Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1950) 7

Salzhandler v. Caputo, 316 F.2d 445 (1963) 24, 25
Sims v. Amos, 340 F. Supp. 691 (M.D. Ala. 1972) 9
Sprague v. Ticonic Nat. Bank, 307 U.S. 161 (1939) 7, 22, 27, 28

Trustees v. Greenough, 105 U.S. 527 (1882) 7

United Brotherhood of Carpenters & Joiners v. Brown, 343 F.2d 872 (10th Cir. 1965) 31

PAGE

Yablonski v. United Mine Workers of America, 466 F.2d 424 (C.A. D.C. 1972) 18, 28

Statutes:

15 U.S.C. §1117 30
42 U.S.C. §1483 10
42 U.S.C. §1982 9

Labor-Management Reporting and Disclosure Act of 1959

Title I
§§101-105 2
§101(a)(1) 20, 32
§101(a)(2) 20
§101(a)(4) 27
§101(a)(5) 20
§102 ..... *passim*
§103 ..... 28, 32

Civil Rights Act of 1964
Title II 9
Title III 20
Title IV 20

Lanham Act
Section 35 30

National Labor Relations Act
Section 8(a)(3) 20
Section 201(c) 29
Section 501(b) 29

PAGE

Securities Exchange Act of 1934
Section 9(e) 29
Section 14(a) 29
Section 18(a) 29

Other Authorities:

H. Rep. No. 741, 86th Cong. 1st Sess. (1959) 16, 34, 35
H. Rep. No. 1147, 86th Cong., 1st Sess. 34
S. Rep. No. 187, 86th Cong. 1st Sess. (1959) 16
S. Rep. No. 197, 86th Cong. 1st Sess. (1959) 32
Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 .....12, 13, 14, 16, 31, 33, 34
Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Cal. L. Rev. 792 (1966) 6
Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 Col. L. Rev. 784 (1939) 7
Hornstein, *The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658 (1956) 7
6 Moore, *Federal Practice*, Para. 54.77(2) (2d ed. 1971) 7
Note, *Allocation of Attorney's Fees After Mills* v. *Electric Auto-Lite*, 38 U. Chi. L. Rev. 316 (1971) 11
Note, *Allowance of Attorney's Fees in Civil Rights Litigation Where the Action Is Not Based on a Statute Providing for an Award of Attorney Fees*, 41 U. Cin. L. Rev. 405 (1972) 11
Summers, *American Legislation for Union Democracy*, 25 Mod. L. Rev. 273 (1962) 26
Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 Yale L.J. 175 (1960) 21

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Interest of Amicus

The American Civil Liberties Union is a nation-wide non-partisan organization with 180,000 members in the United States. It is engaged solely in the defense of those principles embodied in the Bill of Rights. During its fifty year existence the ACLU has been concerned with the special responsibility labor unions have to maintain democratic standards. In a membership organization, freedom of speech and the right to criticize is of prime importance for

the democratic conduct and control of the group. Hence, ACLU is especially concerned that the Bill of Rights provisions of the Labor-Management Reporting and Disclosure Act of 1959, Title I, §§101-105, are interpreted and administered in such a way as to best assure the protection of these rights.

This case raises the important question whether union members are entitled to receive attorneys' fees in actions brought under §102 of the Act. The issues in this case go well beyond the interests of the parties directly involved in it. In the attached brief, therefore, *amicus curiae* presents argument to place the case in broader context, as well as argument directed towards this case.

Statement of the Case

At a regular meeting of the membership of Petitioner's Union on August 6, 1962, John Cole, respondent, attempted to present a set of preambles and proposed resolutions concerning the shipping rules of the Union to the membership. Cole was at first ruled out of order and the meeting continued with other business. Later, Cole was allowed to present the proposals. However, he was not permitted to present them himself; instead they were read by the reading clerk. Thereupon Hall opposed the proposals and characterizing Cole as an ingrate declared that "the plaintiff had violated the Union rules in the past and that the plaintiff should have been charged with violations a long time ago." Immediately thereafter, there being no debate, a vote was taken and Cole's resolutions were overwhelmingly defeated.

On September 4, 1962, a "charge sheet" was filed against Cole alleging that he had violated a provision of the Union Constitution at the August 6 meeting, by maliciously vilifying the officers and the Union. At a meeting on that date the charges were presented to the members and were accepted by a majority vote. Cole was duly notified to appear before a union "Trial Committee" on October 9, 1962, which was to be elected at a special membership meeting held on that date. All members elected to the Trial Committee had voted to accept the charges levied against John Cole on September 4.

The Committee met with the Union Vice President present. Cole, while permitted to present a written defense to the charges. The Committee disclosed no evidence to support its findings of guilt.

Cole then exhausted his intra-union remedies to no avail. He brought suit on December 10, 1963, and six months later, on May 27, 1964, was restored to membership by a temporary injunction. Seven years later the case went to trial and resulted in a permanent injunction restoring Cole to membership rights and awarding him attorney's fees. *Cole* v. *Hall,* 66 L.C. ¶11,953. One year later the decision was affirmed by the Second Circuit. *Hall* v. *Cole,* 462 F.2d 777.

Summary of Argument

Federal Courts have historically exercised the power of awarding counsel fees as a part of the original authority of the chancellor to do equity in a particular situation. That power has been exercised in three situations: first, where the other party's action is vexatious, oppressive or

in bad faith; second, where a plaintiff's representative action creates a common fund for the benefit of the members of the class; and third, where the plaintiff's suit indicates an important statutory policy which relies for its enforcement on private suits, and the suit renders substantial benefits to others as well as the plaintiff. The third category of cases requires no showing of bad faith on the part of the defendant nor the creation of a common fund. Counsel fees are awarded because of the plaintiff's contribution to the enforcement of Congressional policy and to the protection of rights other than his own.

The situation presented here falls squarely into the third category of cases in which courts have traditionally awarded counsel fees. Congress, in enacting the Bill of Rights for Members of Labor Organizations, sought to protect the democratic process in unions and to strengthen union self-government as a necessary corollary to the union's statutory right of exclusive representation. Basic individual rights were guaranteed in order to give union members the tools to combat racketeering, corruption and abuse of power. Congress, in choosing the means of protecting these basic rights and enforcing its policies, relied solely upon suits brought by individual union members.

Successful suits for violation of these rights not only effectuate congressional policy, they confer substantial benefits on the union as an institution and on all of its members. Therefore the cost of achieving these rights should be borne by the union and its members who are the beneficiaries. The plaintiff, by vindicating his right to present a resolution on union policy at a union meeting, opens this forum for debate. The union is benefited by making its decisions more responsible and responsive. The

plaintiff, by vindicating his right to criticize union officers, vindicates the right of all members to speak out. The union's process of self-government is strengthened, and the freedoms of all members are articulated and protected.

Awarding of counsel fees is necessary if congressional policy is to be effectuated. Plaintiffs seldom have the resources to carry through expensive and protracted litigation against defendants whose counsel fees are paid from the union treasury. The plaintiff may recover no damages because the rights violated are political rights incapable of monetary evaluation. Denial of counsel fees to prospective plaintiffs will discourage or bar most union members from fulfilling the responsibility placed upon them by Congress of enforcing basic democratic rights in their union. Payment of counsel fees from the union treasury places the burden where it belongs—on the union whose democratic processes have been strengthened and vitalized, and all of its members who have shared in increased recognition of their rights.

Nothing in the wording of the Act or its legislative history shows that Congress intended to curtail the historical power of the courts to award counsel fees in appropriate situations. The words of Section 102 are all inclusive—"such relief (including injunctions) as may be appropriate." None of the drafters of Title I or its supporters even suggested that courts should have available less than the full panoply of equitable remedies. On the contrary, the whole thrust of the legislative history of Title I demonstrates a dominant concern that the remedies available under Section 102 be fully effective. Indeed, those members of the House who articulated most forcefully the importance of awarding counsel fees included this as one of the reasons for

supporting the Landrum-Griffin bill. Section 102 of that bill contains the very words now in the Act.

In the absence of express intent on the part of Congress to limit the historic power of equity courts to act according to the necessities of the case, the courts retain the power to award counsel fees in appropriate cases for violation of Title I. In a case such as the present one, awarding counsel fees is essential if the rights guaranteed by Title I are to be made real and if the policies of Congress are to be enforced. The burden of vindicating those rights should be taken from the backs of the victim and be shouldered by the union and its members who are the beneficiaries.

ARGUMENT

I.

A Union member whose suit under Title I protects the democratic processes of the Union and secures basic rights for other members of the Union may be awarded counsel fees.

A. *General Principles Guiding Award of Counsel Fees*

The traditional American rule, in contrast with the rule in most other countries, is that counsel fees are not ordinarily awarded to successful litigants. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Cal. L. Rev. 792 (1966). The traditional rule, however, has never been rigidly applied, for both the courts and Congress have developed exceptions to this rule "for situations in which overriding considerations indicate the need for such a recovery." *Mills* v. *Electric Auto-Lite Company*, 396 U.S. 375, 391 (1970).

The courts, in developing exceptions to the traditional rule, have acted upon "the general authority of the chancellor to do equity in a particular situation," *Sprague* v. *Ticonic Nat. Bank*, 307 U.S. 161, 166 (1939). Those exceptions have fallen generally into three broad categories. First, counsel fees may be awarded where the other party's action is vexatious, oppressive or in bad faith. 6 Moore, *Federal Practice*, Para. 54.77(2) (2d ed. 1971); *Bell* v. *School Board of Powhatan County*, 321 F.2d 494 (4th Cir. 1963); *Rolax* v. *Atlantic Coast Line R.R.*, 186 F.2d 473 (4th Cir. 1950). In this exception, the underlying rationale is one of punishment and the essential element is willfulness or bad faith. Second, counsel fees have been awarded where a plaintiff's representative action creates a common fund, the economic benefit of which is shared by all members of a class. *Sprague* v. *Ticonic Nat. Bank, supra;* Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 Col. L. Rev. 784 (1939). The rationale here is that failure to award counsel fees, "not only would be unjust to [the plaintiff] but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage." *Trustees* v. *Greenough*, 105 U.S. 527, 532 (1882). Third, counsel fees have been awarded when the plaintiff by his suit has enforced a statutory policy and has benefited a group of others in the same manner as himself. Hornstein, *The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658 (1956).

It is the third category of cases with which we are here principally concerned. The leading case is *Mills* v. *Electric Auto-Lite Company*, 396 U.S. 375 (1970). In this case, a group of stockholders brought suit to set aside a merger which had been accomplished by a misleading proxy state-

ment. There was no common fund created, and no determination was made that the terms of the merger had been unfair, but the Court awarded counsel fees to be paid out of the corporate treasury. The rationale was expressed in these terms:

> [T]he stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders . . . [P]rivate stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit to all stockholders by providing an important means of enforcement of the proxy statute. 396 U.S. at 396.

In awarding counsel fees, the Court in *Mills* articulated two basic elements: First, the plaintiff's suit vindicated an important statutory policy—here, the policy of "a fair and informed corporate suffrage." Second, by vindicating that policy, the plaintiff benefited other members of the group the same as himself—here, the benefit of other stockholders in being able to exercise an informed suffrage. The plaintiff is awarded counsel fees because, in bringing his suit, "he does so not for himself alone but as a 'private attorney general,' indicating a policy that Congress considered of highest priority." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

In *Piggie Park, supra,* the Court emphasized a third factor which reinforced the successful plaintiff's right to counsel fees—the limited resources of the "private attorney general" to prosecute the violations. With reference to

suits brought to enforce Title II of the Civil Rights Act of 1964, the Court stated:

> If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. 390 U.S. at 402.

The federal courts, in awarding counsel fees in this category of cases where there may be no bad faith or common fund, have not always required or relied upon the presence of all three elements. In some "private attorney general" cases, the courts have emphasized that function of the private suit in enforcing statutory policy, and the need to award counsel fees to make that enforcement effective. Thus, in *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971), the Court of Appeals of the Fifth Circuit awarded counsel fees to a plaintiff who prevailed in a suit against a real estate developer for refusal to sell lots to Negroes in violation of 42 U.S.C. Sec. 1982, on the following rationale:

> The statute under its present judicial development, depends entirely on private enforcement. Although damages may be available, . . . in many cases there may be no damages or damages difficult to prove. To insure that private litigants are willing to act as 'private attorneys general' to effectuate the public purposes of the statute, attorneys' fees should be as available as under 42 U.S.C. Sec. 3612(c). 444 F.2d at 147-8.

In a similar suit for discriminatory refusal to rent an apartment, the Court of Appeals of the First Circuit, in

awarding counsel fees, observed that violation of an important public policy may involve little by way of damages in comparison with the costs of vindication. In such cases an award of costs "will remove the burden from the shoulders of the plaintiff seeking to vindicate the public right," *Knight* v. *Auciello*, 453 F.2d 852, 853 (1st Cir. 1972).

In other cases, the courts have emphasized the benefits rendered to the class represented. Thus, in *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), the court awarded counsel fees to plaintiffs who had successfully sued to compel reapportionment of the Alabama legislature. The class benefited consisted of all voters of the state, and the benefit was protection of the basic right to free and equal suffrage. And in *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), the Court awarded the NAACP counsel fees for successfully prosecuting an action under 42 U.S.C. Sec. 1483 to prohibit continued discrimination in hiring by the state police. The benefit was to Negroes in providing them added employment opportunities.

What has emerged from the *Mills* and *Piggie Park* decisions is a broad category of cases in which the courts, exercising their traditional equitable authority, have awarded counsel fees to successful plaintiffs even though there has been no showing of bad faith on the part of the defendant and the suit has not resulted in a common fund. That category is generally circumscribed by three basic elements. First, the plaintiff's suit vindicates an important statutory policy which relies for its enforcement on private suits. Second, the suit renders substantial benefits to others as well as the plaintiff, benefits which may be as broadly spread as to all other stockholders, all other Negroes, or all voters, and benefits which may be as incapable of valua-

tion as the equal right to rent an apartment, the equal right to state employment, and the right to fair and equal suffrage. Third, the limited damages which can be claimed by the plaintiff in comparison with the costs of prosecuting the action require the awarding of litigation costs if the statutory policy is to be effectively enforced and the benefits are to be rendered to others. Note, *Allocation of Attorney's Fees After Mills v. Electric Auto-Lite,* 38 U. Chi. L. Rev. 316 (1971); Note, *Allowance of Attorney Fees in Civil Rights Litigation Where the Action Is Not Based on a Statute Providing for an Award of Attorney Fees,* 41 U. Cin. L. Rev. 405 (1972).

We turn now to a consideration of how these basic elements apply to suits brought under Title I of the Labor-Management Reporting and Disclosure Act generally, and to this case in particular.

B. *The Statutory Policy Enforced by Private Suits Under Title I*

Title I—the Bill of Rights of Members of Labor Organizations, articulates and implements the central policy of the statute—protection of the democratic process in unions. Although Title I creates privately enforceable rights, the concern reaches far beyond the individual whose rights have been violated. Individual rights were protected to increase the responsibility of union self-government, for responsible self-government was preferred to government control of union policies. Senator McClellan, in introducing the Bill of Rights, stated his belief that "racketeering, corruption, abuse of power and other improper practices" would never be prevented until Congress prescribed "minimum standards of democratic process." "Without such pro-

tection," he declared, "other provisions of law may be of little benefit and meaningless," **II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959**, p. 1098 [hereinafter cited as Leg. Hist.]. During the course of the debate, he summarized the basic policy underlying Title I:

> If we want fewer laws—and want to need fewer laws—providing regulation in this field, we should start with basic things. We should give to union members their inherent constitutional rights, and we should make those rights apply to union membership as well as to other affairs of life. We should protect the union members in those rights. By so doing we will be giving them the tools they can use themselves. II Leg. Hist. 1103.

The public interest in protection of these rights was underlined by making any willful interference with these rights by a union officer or agent a criminal offense (Section 102), and by providing that civil enforcement should be by suits brought by the Secretary of Labor "for such relief as may be appropriate, including, but without limitation, injunctions to restrain any such violations and compel compliance with this title." II Leg. Hist. 1102. Protection of these rights was not to rest solely on the interest and ability of the aggrieved member, for these were public rights to be publicly protected.

Criticism of these enforcement provisions did not challenge the basic proposition that effective enforcement of the Bill of Rights would implement the policy of Congress to protect democratic processes in unions and thereby make union self-government more responsible. Criticism

was directed almost entirely to three points. First, enforcement of these rights through injunction suits by the Secretary was nearly identical to enforcement provisions in civil rights legislation which a number of Senators had adamantly opposed the year before. II Leg. Hist. 1110, 1111, 1112, 1113. Second, fear was expressed that the Secretary would be overwhelmed by the burden of initiating suits "on behalf of 15 million Americans." II Leg. Hist. 1113, 1114, 1117. Third, the criminal provision was criticized as being too vague, making union officers vulnerable to felony prosecutions for minor and borderline violations. II Leg. Hist. 1117. Despite these criticisms, the Bill of Rights passed the Senate with these enforcement provisions unchanged. II Leg. Hist. 1119.

Two days later, Senator Kuchel introduced a redrafted version of the Bill of Rights on behalf of himself and eight other senators, six of whom had voted against the earlier version. The revised Bill of Rights eliminated suits by the Secretary, and substituted in Section 102, suits by the union member.

> Sec. 102. Any person whose rights secured by the provisions of this title have been infringed may bring an action in a district court of the United States for such relief as may be appropriate.

The only explanation of this change was that "giving this type of right to the aggrieved employee member himself was in the interest of justice," and there was no suggestion that protection of these rights was of any less public concern or any less important to the implementation of Congressional policy. On the contrary, Senator Kuchel went to special pains to make clear that criminal penalties for

violations of these rights still remained. II Leg. Hist. 1232. He reassured his colleagues that the Attorney General stood behind the guarantee of these rights.

The Landrum-Griffin bill, H.R. 8400, eliminated the Senate provision for criminal enforcement of Title I, and substituted Section 609, as presently worded. I Leg. Hist. 676. Representative Griffin explained that this change had been made because "the conduct prohibited by this section is generally comparable to conduct described as an unfair labor practice under the Taft-Hartley Act and, accordingly, we do not believe that criminal sanctions are warranted." The rights protected were still viewed as publicly protected rights, like those protected by the Taft-Hartley Act, but the appropriate sanctions were civil remedies, not criminal prosecution. Enforcement was to be through suits brought by individual members instead of through complaints prosecuted by the General Counsel of the National Labor Relations Board.

Permeating the whole legislative history of Title I was the Congressional purpose to protect basic democratic rights guaranteed by Title I as an essential part of strengthening the democratic process in unions. Protection of these rights was of public concern, because free exercise of these rights was in the public interest. Responsibility for enforcement of these rights was first placed in the Secretary of Labor and the Attorney General, but reliance ultimately was placed on suits by individual union members. The rights were no less infused with public concern, for effective enforcement of these guarantees was essential to effectuate Congressional policy. Individual union members were to serve as substitutes for the Secretary of

Labor, the Attorney General or the General Counsel of the NLRB. When an individual member brings a suit, "he does not do so for himself alone, but also as a 'private attorney general' vindicating a policy of highest priority." *Newman* v. *Piggie Park*, 390 U.S. 400, 402 (1967).

The rights protected by the plaintiff's suit in this case are ones which are most central to the Congressional policy of protecting democratic processes in unions. The plaintiff, who had criticized the union officers for their handling of union funds, sought to challenge the incumbent president for office (Appendix C, Petition for Cert., p. 11a). As a part of these efforts to change the policies and the leadership of the union, he introduced at a union meeting a resolution criticizing the lack of democracy in the union, discriminatory application of union rules, failure to follow the union contract, and raiding of other unions (Appendix E, pp. 28a-30a). His resolution sought changes in procedures in assigning jobs from the union's hiring halls (Appendix E, p. 32). Because he questioned the union's policy of raiding other unions, he was charged with "deliberate and malicious vilification" of the officers expelled.

The plaintiff was engaged in precisely the kind of conduct Congress sought to encourage and protect. The plaintiff sought to use the internal processes of the union to correct what he considered abuses and to change the policies of the union. For this he was expelled. The plaintiff's suit to avoid the expulsion vindicated the basic policy of Congress in protecting the right of free speech, the right to participate in union meetings, and the right to seek a change in union policies and leadership. "The pervading premise of both of these titles [Title I and IV] is that there should be full and active participation by the rank and

file in the affairs of the union." *Musicians Federation* v. *Wittstein,* 379 U.S. 171, 182-3 (1964). Only the plaintiff could vindicate the Congressional policy, and only by the suit which he successfully brought. Congress relied upon individual union members to enforce its policy, and the plaintiff has fulfilled that responsibility as a "private attorney general" successfully prosecuting this suit.

C. *The Benefit Conferred on the Union and on Other Members of the Union*

Congress clearly determined, in enacting the Labor-Management Reporting and Disclosure Act, that encouraging and protecting the democratic processes in unions would benefit the union as an institution. Sen. Rep. No. 187, 86th Cong. 1st Sess. (1959) pp. 6-7 (I Leg. Hist. 402-3) H. Rep. No. 741, 86th Cong. 1st sess. (1959) p. 6 (I Leg. Hist. 764). Protecting democratic rights would give union members the tools with which to correct abuses and conduct responsible self-government. This, in turn, would create confidence in the integrity of unions and avoid the need for further legal controls. II Leg. Hist. 5810.

The plaintiff's suit here has promoted and encouraged the democratic process in this union. It has articulated for the officers and the members that "there should be full and active participation by the rank and file in the affairs of the union." *Musicians' Federation* v. *Wittstein, supra:* that is, union members have a right to criticize their officers and question union policies; and that union meetings are to be open to discussion and debate. The suit has served as a union "therapeutic," see *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970), to help cure the defects in the

union's democratic process. *Kerr* v. *Screen Extras Guild, Inc.*, 466 F.2d 1267 (9th Cir. 1972). This contribution to restoration of the union to democratic control entitles the plaintiff to payment of counsel fees from the union treasury, *Ratner* v. *Bakery & Confectionery Workers International Union*, 335 F.2d 691 (C.A. D.C. 1964).

The benefit rendered to other members of the union by the plaintiff's suit is manifest. No arguments or citations are needed to this Court to demonstrate the chilling effect which punishing one man for what he says has on all others who may want to speak. When the plaintiff sued to protect his rights, he dispelled the chill cast on other members' rights. In protecting his right of free speech, he gave them increased freedom to speak; in voiding his expulsion he freed them from the fear of charges. The judgment he won inured to the benefit of all his fellow members. As Mr. Justice Clark said in the decision below, "In vindicating his right, he vindicated their right." 462 F.2d at 780.

The "therapeutic" contribution of the plaintiff's suit, both to the union and to the other members, was desperately needed, for the democratic life within this union had lost vitality. The trial court found that the union officers and the members who voted to expel the plaintiff "in good faith, believed that they had a right to charge and discipline the plaintiff for his actions at the meeting of August 6, 1962" (Appendix C, p. 19a). This finding of "good faith" is a finding of near fatal illness in the democratic process in this union. It is a finding that the officers and the members present believed that a member was not entitled, in a union meeting, to question union policies or to submit resolutions for changes of union policies. It is a finding that the union officers and members present believed that

criticism of union officers for pursuing certain policies constituted "deliberate and malicious vilification" of officers. It is a finding that the Trial Committee believed that he could be expelled on these charges even though there was no evidence to support the charges placed against him (Appendix E, p. 35a). Within this union, the prevailing conception of the democratic process was one which did not recognize the most basic rights guaranteed by Congress. The plaintiff's suit helped make clear in concrete terms, to the officers and the members, the kind of process Congress intended. A suit such as this was essential to dispel the prevailing misconception, within the union, inform union members of their rights, teach the union to respect those rights, and set the union on the road to recovery of its democratic vitality.

The argument that the plaintiff has gained some personal benefit from the suit need not detain us long. This has not been considered a bar to the awarding of counsel fees where the plaintiff's suit has enforced Congressional policy or benefited others. *Yablonski* v. *United Mine Workers of America,* 466 F.2d 424, 431 (C.A. D.C. 1972); *Burch* v. *International Association of Machinists,* 454 F.2d 1170 (5th Cir. 1971); *Lee* v. *Southern Home Sites Corp.,* 444 F.2d 143 (5th Cir. 1971); *Knight* v. *Auciello,* 453 F.2d 852 (1st Cir. 1972); *NAACP* v. *Allen,* 340 F. Supp. 703 (M.D. Ala. 1972). The rationale for awarding attorneys' fees is the contribution made by the plaintiff either to Congressional policy or to others. Where there is a substantial benefit to others, "To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich others unjustly at

the plaintiff's expense." *Mills* v. *Electric Auto-Lite Co.*, 39 U.S. at 392.

Moreover, the benefits obtained by the plaintiff in this case are not significantly different from those obtained by other members. Indeed, his benefit is less. He was awarded no monetary damages, his only benefit was the voiding of his expulsion. At the end of the suit, he has nothing more than union membership with the right of free speech within the union, the same rights enjoyed by all the other members. In the meantime, he was totally excluded from the union membership for nearly two years before he exhausted his internal appeals and obtained a temporary injunction, he carried the burden of prosecuting the case for nearly nine years, and he was injured and forced to retire before his rights were vindicated. The primary beneficiaries of this long and costly suit to establish the right of free speech within the union are the union and its present members.

The plaintiff, by his suit, has plainly conferred a substantial benefit on the union as an institution, and upon all other members of the union. It would be unjust for them to enjoy the full benefits of his litigation and not bear its costs. Moreover, there is a common fund from which these costs can properly be paid—the union treasury. The union treasury is a fund made up of contributions by the members and held for the benefit of the organization and its members. Payments of the costs of a Title I suit from which the union and its members have benefited is a proper use of those funds. *Johnson* v. *Nelson,* 325 F.2d 646 (8th Cir. 1963). Indeed, it would be a perversion of justice and a flaunting of Congressional policy to permit the use of union funds to pay litigation costs incurred in resisting

recognition of the democratic rights and deny the use of those funds to reimburse the litigation costs incurred in protecting those rights on behalf of all members.

D. *The Need for Award of Counsel Fees*

The need for award of counsel fees is particularly acute in most Title I actions if Congressional policy is to be implemented or union members are to enjoy fully the rights guaranteed by the Title. The reasons for this are quite obvious.

First, the rights involved are essentially political rights—equal rights to nominate candidates, vote in elections, and participate in union meetings, Section 101(a)(1); the right of freedom of speech and assembly, Section 101(a)(2); and the right to a fair trial, Section 101(a)(5). Monetary values cannot be placed on these rights and their violation seldom entitles the aggrieved member to compensatory damages. Denial of these rights, even expulsion for their exercise, may result in no interference with the victim's employment; indeed, Section 8(a)(3) of the National Labor Relations Act prohibits any discrimination in employment because employees are "good, bad, or indifferent members." *Radio Officers* v. *Labor Board,* 347 U.S. 17, 40 (1954). Successful litigation holds out no prospect of a damage award out of which the costs of litigation and counsel fees can be paid.

Second, suits are brought by individual workers, often isolated individuals who have little or no group support. Unlike suits under Title IV-Elections, where almost by definition the plaintiff is supported by a substantial group, or suits under Title III-Trusteeships, where the plaintiff is the local union or speaks for it, in Title I suits the individual member frequently has no resources except his

meagre savings, the charity of his friends and the devotion of his lawyer.

Third, the defendants can draw upon the full resources of the union to frustrate the suit. The individual whose rights have been denied must sue the union and its officers who have recourse to the union treasury to defend the action. He cannot match these resources and the defendants can exploit every procedural device to complicate and prolong the suit and exhaust all costly and extended appeals. The plaintiff, with no hopes of recovering litigation costs, is often compelled to abandon vindication of his rights. Summers, *The Law of Union Discipline: What the Courts Do in Fact,* 70 Yale L.J. 175, 220-1 (1960).

The present case exemplifies the reasons which make award of counsel fees so necessary in many Title I actions. The union here violated the most basic rights guaranteed by the Bill of Rights. Although the plaintiff was expelled for exercising his right of free speech and barred from running for union office or attending union meetings, he recovered no damages. He was singled out and silenced, left to vindicate his rights from his meagre resources with the support of counsel, who served largely on a *pro bono publico* basis.* He was confronted with an appeal from a temporary injunction, 339 F.2d 881 (1965), multiple motions, interrogatories, an extended trial and a second appeal. The litigation lasted more than nine years, and only because of the devotion of his counsel was he able to carry the case to a successful conclusion.

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* The attorneys for *amicus curiae* confirm the finding reflected in the opinion of the Court of Appeals, that this suit was not sponsored or financed by the American Civil Liberties Union or its affiliates.

If the plaintiff in this case is not now awarded litigation costs and counsel fees, the overriding lesson for him, for his counsel and for all other union members will be to not insist on asserting the rights proclaimed by Title I and attempting to vindicate them in the courts. His rights will be nominally vindicated, but the policy of Congress will not have been enforced, and the other members of the union will receive no benefits. For all the union members will know, and their officers will know they know, that Title I is but empty words which hold a promise to the ear but break it to the heart. Mr. Justice Clark, in writing the opinion below, engaged in no hyperbole when he said, "Not to award counsel fees in cases such as this would be tantamount to repealing the Act by frustrating its basic purpose." 462 F.2d at 780.

E. *The Irrelevance of "Good Faith" Where the Suit Enforces Congressional Policy and Benefits the Union and Its Members*

The trial court refused to grant punitive damages because "the defendants, in good faith, believed that they had a right to charge and discipline the plaintiff for his actions at the meeting of August 6, 1962." This lack of showing of malice does not bar the court from exercising "the general authority of the chancellor to do equity in a particular situation." *Sprague* v. *Ticonic Nat. Bank*, 307 U.S. 161, 166 (1939).

Where the underlying rationale for awarding counsel fees is one of punishing the defendant for its "unreasonable, obdurate obstinacy," *Bradley* v. *School Board of City of Richmond, Virginia*, 345 F.2d 310, 321 (4th Cir. 1965), then a finding that the defendant has acted in good

faith saves it from a punitive award of counsel fees. *Brewer* v. *School Board of The City of Norfolk, Virginia*, 456 F.2d 943 (4th Cir. 1972). This, however, is a different category of cases than the one now before the Court.

The rationale for awarding counsel fees here is that the plaintiff, by his successful suit, has enforced Congressional policy, and has conferred a substantial benefit on the union and its members. When Congress has relied upon private suits to enforce its policy, then counsel fees are awarded because of the service the plaintiff has performed and the necessity of awarding counsel fees to enable him to perform that service. The good faith of the defendant does not deprive the plaintiff of his right to counsel fees. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972). When substantial benefits are conferred on defendants, simple justice requires the defendants help bear the burden. The defendants' good faith does not entitle them to unjust enrichment. *Mills* v. *Electric Auto-Lite*, 396 U.S. 375 (1970).

In *Mills, supra,* there was no showing that the directors, in sending out the misleading proxy statement, acted in bad faith, or that it worked any unfairness on minority stockholders. But the plaintiffs were allowed to recover counsel fees out of the corporate treasury. This was "not to saddle the unsuccessful party with the expenses but to impose them on the class benefited." 396 U.S. at 396-7. So here, the union officers and other members may have believed in good faith that they had a right to discipline the plaintiff, and they may have believed it was in the best interests of the union, but plaintiff's suit has encouraged and protected the democratic process in the union and has

protected the rights of every member. The union and its members have reaped the benefits of his suit, regardless of their initial good faith, and should pay for those benefits out of the union treasury. Indeed, the finding of initial good faith in believing that a member could properly be expelled for criticizing union officers and questioning union policy underlines the importance of the benefit which the plaintiff has conferred in encouraging and protecting the democratic process within this union.

Even if good faith were a defense to claims for counsel fees, the finding here would not bar recovery. The finding here is only that there was good faith in bringing charges and expelling the plaintiff from the union in October, 1962. At this time, there may have been some reason for believing that the right of free speech under Title I did not protect such vigorous criticism and advocacy. However, in April, 1963, the Court of Appeals of the Second Circuit explicitly held in a widely publicized decision that unions could not expel members for slandering union officers by accusing them of mishandling union affairs. *Salzhandler* v. *Caputo*, 316 F.2d 445. Subsequent to this decision, the defendants resisted the plaintiff's suit, and appealed from a temporary injunction ordering him reinstated. The temporary injunction was affirmed on the authority of *Salzhandler* v. *Caputo*, with the Court of Appeals making unmistakably plain that the plaintiff could not be expelled for the conduct with which he was charged. *Cole* v. *Hall*, 339 F.2d 881 (2d Cir. 1965).

Despite this ruling by the Court of Appeals, and in the face of accumulating precedents in the Second Circuit giving broad scope to the right of free speech, *Farowitz* v.

Associated Musicians, 330 F.2d 999 (2d Cir. 1964); *Giordani* v. *Upholsterers International Union,* 403 F.2d 85 (2d Cir. 1968), the defendants stubbornly insisted on protracting the litigation for a period of seven more years. The course of litigation, and the tactics of the defendants to forestall complying with the law was summarized by Mr. Justice Clark, in the opinion below:

> It has been pending almost ten years, has been to this court twice, has consumed hundreds of hours of court time of four trial judges, accumulated thousands of pages of motions, written interrogatories, briefs, arguments, opinions, etc. some 1200 pages of testimony, two panels of judges of this court and literally thousands of hours of counsel time. The record shows that it took six months for Cole to secure his temporary injunction, largely because of dilatory action of the union and its officers; seven years to get his trial and now two years to obtain final vindication of a right not only specifically secured to him by the Act itself but fundamental to a free society as well. 462 F.2d at 780.

All the district court found was that the defendants were in good faith when they expelled the plaintiff in 1962, prior to the decision in *Salzhandler* v. *Caputo, supra.* But any good faith belief that this expulsion was legal could scarcely have survived after the Court of Appeals' explicit language in affirming the temporary injunction in 1965. As the court below noted, "it is manifestly clear that Cole's conduct was protected," 462 F.2d at 779, but even as late as 1972, the defendant was making an argument "virtually identical to that rejected" in the *Giordani, supra,* and *Farowitz, supra,* cases, decided four and eight years before. Con-

tinued refusal by the union after that date, to void the expulsion, constituted "unreasonable, obdurate obstinancy," *Bradley* v. *School Board of City of Richmond, Virginia, supra,* entitling the plaintiff to counsel fees.

F. *The Limited Burden on the Union*

Appellant has argued that awarding counsel fees to plaintiffs whose Title I rights have been violated would deplete the local union's treasury and "most seriously weaken, undermine and vitiate the local union's organizational and representative essential strength." This argument proceeds from three premises which need only to be articulated to be disproved.

The first premise is that encouraging and protecting the democratic rights in unions does not strengthen and vitalize the union organization in representing its members. This is contrary to the determination of Congress in enacting the Act, and it is contrary to the labor movements own concern with strengthening democratic processes in unions. Summers, *American Legislation for Union Democracy,* 25 Mod. L. Rev. 273, 275-6 (1962). The AFL-CIO Ethical Practice Code on Democratic Process declares:

> Freedom and democracy are essential attributes of our movement. Labor organizations lacking these attributes are unions in name only. Authoritarian control is contrary to the spirit, the tradition and the reasons which should govern and guide our movement.

The second premise is that local unions, unfamiliar with legal rules and procedures, will make innocent mistakes with costly consequences. But union constitutions custom-

arily provide for appeals to international officers, and Section 101(a)(4) requires a member to exhaust reasonable procedures available within four months. *Detroy* v. *American Guild of Variety Artists,* 286 F.2d 75 (2d Cir. 1961). The union has ample opportunity for review and self-correction prior to suit. Ultimate responsibility for a member being forced to sue to obtain recognition of his Title I rights rests on the top officers of the international union, who have available advice of competent counsel.

The third premise is that the individual plaintiff can better bear the burden than the local union. The function of the suit and its fruit is strengthening and vitalizing the internal processes of the unions, giving greater protection to the democratic rights of members. These fruits would not be enjoyed but for the plaintiff's suit. The simple question is who should bear the cost. If the union recognizes and appreciates the value of what the plaintiff has done, it should willingly pay. *Johnson* v. *Nelson,* 325 F.2d 646 (8th Cir. 1963).

II.

Congress did not preclude courts of equity from awarding counsel fees in Title I suits.

The award of counsel fees requires no express statutory authorization, *Mills* v. *Electric Auto-Lite,* 396 U.S. 375 (1970), for "the foundation for the historic practice of granting reimbursements for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation," *Sprague* v. *Ticonic National Bank,* 307 U.S. 161, 166 (1939). "Allowance of such costs in appropriate situations

is part of the historic equity jurisdiction of the federal courts." *Id.* at 164.

Suits under Title I which enforce the Congressional policy of democratic unionism and which thereby benefit the union and its members fall within the class of cases in which the courts of equity have exercised their authority to award counsel fees. The courts retain that historic authority unless Congress has manifested an intent to preclude its exercise. Where the award of counsel fees is necessary to effectuate basic policies of Congress or to require those who have benefited from a suit to bear its costs, the intent of Congress to bar such awards ought not be inferred, "absent the positive interposition by Congress of a barrier to judicial allowance of attorney's fees." *Yablonski* v. *United Mine Workers of America,* 466 F.2d 424, 430 (C.A. D.C. 1972).

A. *The Words of Title I*

Nothing in the words of Title I preclude courts from awarding counsel fees in appropriate cases. On the contrary. Section 102, provides:

> Any person whose rights secured by the provisions of this title have been infringed by any violation of the title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.

It would be difficult to design words which would more clearly express the intent that the courts should have the full panoply of equitable remedies, including the award of counsel fees. To insure that no existing rights or remedies would be lost, Congress added Section 103, providing:

> Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal . . .

B. *The Negative Inference Drawn From Other Sections*

The clear import of the words of Title I, that the courts retain their historic equitable authority to award counsel fees, is sought to be overcome by looking to other sections in other titles of the Act. The argument is that because Congress in Section 201(c), and in Section 501(b), expressly provided for recovery of counsel fees, its failure to make a similar express provision in Section 102 shows an intent to preclude award of counsel fees in suits brought under Section 102. This argument places more weight on a negative inference than it can bear.

First, the historic authority of the court of equity to grant the remedies which justice requires, confirmed in its full measure by the unqualified words of Section 102, cannot be so readily overridden. In *Mills, supra,* the Court awarded counsel fees in a suit brought under Section 14(a) of the Securities Exchange Act of 1934. That section, like Section 102 here, contained no express authorization for such an award, but two other sections, Section 9(e) and Section 18(a) expressly provided for recovery of attorney's fees in other cases. In response to the same argument from negative inference, the Court declared:

> We agree with the Second Circuit that the specific provisions in Sections 9(e) and 18(a) should not be read as denying to the courts the power to award counsel fees in suits under other sections of the Act when

circumstances make such an award appropriate. 396 U.S. at 390-1.

The case of *Fleischman Corp.* v. *Maier Brewing Company,* 386 U.S. 714 (1967) is clearly distinguishable. The Court there held that the remedial provisions of the Lanham Act precluded an award of attorneys' fees in a suit for trademark infringement. Suit had been brought under Section 35 of the Lanham Act which expressly provided that the plaintiff was entitled "subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. . . . In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as damages, not exceeding three times such amount." 15 U.S.C. 1117. It was this provision to which the Court referred when it said that "Congress had meticulously detailed the remedies available to the plaintiff," 386 U.S. at 719, and it was into the very section which provided "meticulously detailed" remedies that the plaintiff wanted to read in a right to counsel fees. In addition, several attempts to add to Section 35, an express provision allowing recovery of counsel fees, had failed of enactment. It was from this that the Court concluded that Congress "intended Section 35 to mark the boundaries of power to award monetary relief in cases arising under the Act." 386 U.S. at 714.

The case before the Court bears no resemblance to *Fleischman.* Section 102 does not prescribe "meticulously detailed" remedies like those in Section 35 of the Lanham Act. On the contrary, Section 102 provides for the full

range of equitable remedies in the most general terms. No attempts have been made to write into Section 102 an express provision for counsel fees, and never during the legislative history of the Act was any such addition proposed.

Second, the argument, resting as it does on the different wording in different sections, assumes that the statute was a carefully drafted and closely integrated code. It assumes that the wording of each section was precisely drawn with reference to and in comparison with the wording of every other section. The very structure of the statute contradicts this assumption. The statute consists of six separate titles, each one dealing with a separate problem area, each one standing almost wholly independent of the others, with its own substantive and remedial provisions. The titles do not always mesh smoothly, and the courts are left with the task of reconciling and integrating. See *Calhoon* v. *Harvey,* 379 U.S. 134 (1964); *Grand Lodge of Machinists* v. *King,* 335 F.2d 340 (9th Cir. 1964); *United Brotherhood of Carpenters & Joiners* v. *Brown,* 343 F.2d 872 (10th Cir. 1965).

The statute was not precisely worded and tightly integrated because major portions were changed or added during the course of debate. This was particularly true of Title I, which was added as an amendment on the floor of the Senate, II Leg. Hist. 1102, and then subject to so many amendments that when it was voted, many Senators did not know what it contained. II Leg. Hist. 1229. To read Section 102 by comparing it with Sections 201(c) and 501 (b), and to find in its lack of express provision for award of counsel fees, is to read the statute divorced from the realities of its legislative history. It is to a more detailed examination of that history that we now turn.

C. *Legislative History of Section 102*

On April 15, 1959, the Senate began debate on S. 1555, reported by the Committee on Labor and Public Welfare, II Leg. Hist. 1020. It consisted of five titles regulating internal union affairs and a sixth title containing amendments to the National Labor Relations Act. S. Rep. No. 197, 86th Cong., 1st sess. 1959, I Leg. Hist. 397. One week later, on April 22, 1959, Senator McClellan offered as amendment to S. 1555, an entirely new title to be inserted as Title I—Bill of Rights of Members of Labor Organizations. II Leg. Hist. 1102.

The Bill of Rights, as introduced by Senator McClellan, had two enforcement provisions. Section 102 made willful interference with the exercise of any right guaranteed in Section 101 punishable by a fine up to $10,000 and imprisonment of not more than two years. Section 103 provided that in case of violation or threatened violation of the title, the Secretary of Labor might bring an action "for such relief as may be appropriate including, but without limitation, injunctions to restrain any such violations and to compel compliance with this title." *Ibid.*

At this point it should be noted that these provisions marshalled the maximum enforcement power to secure the rights guaranteed to union members—severe criminal penalties and unlimited injunctive relief. And this protection was to be provided without any burden on the individual union member for litigation costs or counsel fees.

As pointed out earlier in this brief, these enforcement sections were criticized during the Senate debate because of their similarity to provisions proposed in civil rights legislation the year before, because the Secretary might be

overwhelmed by the burden of cases, and because the severe criminal penalties might fall on innocent union officers. No one suggested that the civil remedies should be more limited; on the contrary, the argument was that authorizing the individual to sue would make them more effective. Nor did anyone suggest that the cost of enforcing these rights should be placed on the aggrieved individual member.

After more than 100 amendments were submitted, II Leg. Hist. 1229, none of which changed the enforcement sections, the Bill of Rights was adopted on the same day it was introduced, and was passed by a one vote margin. II Leg. Hist. 1119. Two days later, Senator Kuchel, on behalf of himself and eight other Senators, submitted as an amendment a redrafted version of the Bill of Rights to be substituted for the one originally adopted. II Leg. Hist. 1220. This was submitted at 10 o'clock at night before the proposed amendment had even been printed. II Leg. Hist. 1223. It was introduced at that late hour and before it had been printed because debate on the entire bill was drawing to a close and a vote had been planned for that night. II Leg. Hist. 1229.

The following day, in introducing debate, Senator Kuchel explained that when the text of the Bill of Rights had been printed as amended, he and many other Senators became aware that its language created many problems. As a result, a number of Senators, including both some who had voted for and some who had voted against the Bill of Rights originally, had agreed on a redrafted version. II Leg. Hist. 1229.

Senator Kuchel's amendment eliminated suits by the Secretary of Labor and substituted suits by individual members. Section 102 of this amendment provided:

> Any person whose rights secured by the provisions of this title have been infringed may bring an action in a district court of the United States for such relief as may be appropriate.

This is identical to the wording in Section 102, except that the parenthetical words "(including injunctions)," which were in neither S.1555 as it passed the Senate, nor in H.R. 8342 as it passed the House, II Leg. Hist. 1694. They were added by the Conference Committee, without any explanation. H. Rep. No. 1147, 86th Cong., 1st sess., I Leg. Hist. 934.

Senator Kuchel characterized this change in the method of enforcement a "major change," II Leg. Hist. 1230, but his only explanation was that "giving this type of right to the aggrieved employee member himself is in the interest of justice." * Its importance, apparently, was that it enabled a number of senators, who had originally voted against the Bill of Rights because of its similarity to civil rights legislation which they had opposed the preceding year, to change their votes and support the revised version. See speech of Senator Johnston, II Leg. Hist. 1223.

Nothing in the Senate debate suggested that the union member who sued to enforce the rights guaranteed should have limited remedies or that the words "such relief as may be appropriate" should have any shorter reach than the historic equity powers of the federal courts.

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* Immediately thereafter, Senator Kuchel described the effect of the much less explicit words of Section 40(c), "enforceable at the suit of any bona fide candidate for union office in the district court of the United States" as entitling the court "to give such relief as it deems equitable under all the circumstances." II Leg. Hist. 6021.

The Kuchel amendment was adopted by a vote of 77 to 14, II Leg. Hist. 1239, and the same day S.1555 was passed by a vote of 90 to 1, Senator Goldwater casting the sole dissenting vote.

Six weeks later, Senator Goldwater submitted a 30,000 word criticism of S.1555 to the House Committee on Education and Labor. II Leg. Hist. 1280-1293. His criticisms ranged over almost every section in all seven titles. Buried in this barrage of criticism was one paragraph criticizing the failure of Section 102 to grant to the successful plaintiff the right of counsel fees. In making this criticism, he showed no awareness that the words "such relief as may be appropriate" would, on their face, embrace the whole panoply of equitable remedies, including the award of counsel fees in appropriate cases, but apparently assumed that an express grant was necessary for courts to grant such relief. Moreover, it should be noted, that during the Senate debate on the Kuchel amendment, he accepted the change in Section 102 because of "a reasonable objection" of our "southern friends." II Leg. Hist. 1238. Seen in context, Senator Goldwater's statement did not represent any understanding on the part of any senator. It represented only his grasping for any imaginary stick with which to flay the bill which he alone had voted against.

H.R. 8342, as reported out by the House Committee on Education and Labor, H. Rep. No. 741, 86th Cong., 1st Sess., I Leg. Hist. 759, provided for enforcement of Title I rights through suits by individual members. Section 102(b) provided

> If, upon a preponderance of the evidence after a trial upon the merits, the court finds that a violation of

> Section 101 has occurred, the court shall have jurisdiction to restrain such violation and to grant such other and further relief as may be appropriate.

Representative Elliott, in defending the Committee bill, stated that this section "gives it [the court] a wide latitude to grant relief according to the necessities of the case." II Leg. Hist. 1584.

Dissenters from the House Report included as one ground for criticism of S.1555, that "Under that bill the individual member must shoulder the burden of litigation costs himself. The union officers, on the other hand, have the entire resources of the union at their disposal." II Leg. Hist. 853. These dissenters, at the end of their criticisms, concluded, "For the reasons outlined above, we intend to support on the floor of the House the so-called Landrum-Griffin bill." II Leg. Hist. 856. Among the signers of this was Representative Griffin.

But the Landrum-Griffin bill which these dissenters supported, and which was drafted by one of them, contained in Section 102, the very words now in the statute. The clear implication is that they believed and intended, in a Humpty Dumpty fashion, that these words carried with them recognition of the equity court's historic authority to award counsel fees for successful suits to enforce rights guaranteed by Title I.

The shadow cast on Section 102 in the entire legislative history comes from the statements of Senator Goldwater and the dissenters from the House Report. But these statements, seen in their context, demonstrate only that which is

well-known, that no light on Congressional intent in enacting a statute will be found in the denunciations of its detractors. It would be bitter irony and an affront to common sense if the statements of those who wanted union members to have the most effective remedies available should be used as reasons for depriving members of the one remedy they most need to make the other remedies real.

Although the legislative history is not explicit, Congressional intent on the critical issue emerges quite plainly. Congress intended that the courts, in granting "such relief as may be appropriate" for violation of the basic democratic rights should give such relief as might be necessary to make those rights effective. Congress did not intend that Section 102 should mean less than it said, that courts should not have full authority to grant relief "according to the necessities of the case." Not a single line of legislative history suggests that any supporter of the Bill of Rights as enacted wanted or intended to deprive courts of their power to award counsel fees in appropriate cases.

CONCLUSION

For the reasons set forth above, the decision below should be affirmed.

Respectfully submitted,

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